In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 628

ARTHUR ANTHONY ROCCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 88)[1] is reported at 193 F. 2d 1008. The opinion of the District Court (R. 77-86) on petitioner's motion for judgment of acquittal or a new trial is reported at 99 F. Supp. 746.

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[1] "R." refers to the printed appendix filed by petitioner; "Tr." to the typewritten transcript of the trial; and "D." to the list of documents comprising the record on appeal.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1952 (R. 89). The petition for a writ of certiorari was filed on March 4, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction.

2. Whether the trial court erred in admitting in evidence petitioner's conversation with a banker regarding the disposition of certain securities alleged to have been stolen.

STATUTES INVOLVED

18 U.S.C. 2314 provides in pertinent part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *.
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> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

18 U.S.C. 2315 provides in pertinent part as follows:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or mer-

chandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

18 U.S.C. 2(b) provides:

Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania on eighteen counts, nine of which charged him with transporting or causing to be transported to the Western District of Pennsylvania certain identified securities which had been stolen outside the State of Pennsylvania, in violation of 18 U.S.C. 2314, and the other nine with the sale of such securities in violation of 18 U.S.C. 2315 (D. 2; R. 76). He received a general sentence of 10 years' imprisonment and a fine of $10,000 plus costs on the eighteen counts (R. 3). On appeal, the judgment of conviction was affirmed upon the opinion

rendered by the trial court in denying petitioner's motion for a judgment of acquittal or in the alternative for a new trial (R. 88).

The evidence adduced by the Government showed the following facts:

On May 2, 1944, a group of identified Home Owners' Loan bearer bonds, which had been called for redemption, having an aggregate value of $100,-225, disappeared from the desk of an employee of the Bank of America, at Los Angeles, California, while the employee was called away from her desk to answer an inquiry (Tr. 24-27, 32-34, 42-46).

On May 15, 1945, a group of identified bearer U. S. Treasury bonds of the face value of $100,000 disappeared from the desk of an official of the Union National Bank, at Newark, New Jersey, when the official momentarily left his desk (Tr. 67-75).

On July 21, 1948, a group of identified West Penn Power Company bearer bonds, with a par value of $20,000 vanished from the New York office of Blyth & Company, Inc., investment bankers, while they were being prepared for delivery to a purchaser (Tr. 102-103, 105, 107-109, 113, 116-120, 121-122, 128-142, 147, 149-156, 158, 159-165, 170-171, 173-176, 211-218).

On September 13, 1948, a group of identified U. S. Treasury bonds, of the par value of $20,000 pledged as collateral with the Modern Industrial Bank in New York City, disappeared from the desk

of an employee of the bank (Tr. 184-191, 199-202, 220-226, 235-242).

During March and April, 1948, petitioner sold a group of Treasury bonds, of a par value of $79,000, which were part of the bonds missing since 1945 from the Union National Bank in Newark. He acted through Nesbitt, an official of the bank at Homer City, Pennsylvania, petitioner's home town, through whom he had a few months earlier obtained a $700 loan (Tr. 260-261, 265-269, 277-334; R. 4-6, 9-13).

On the evening of August 3, 1948, petitioner conferred with Nesbitt concerning the disposition of additional bonds (Tr. 272, 386-388, 394-397, 405; R. 13-14, 35-37, 42-46). Petitioner inquired specifically about the marketability of HOLC and West Penn bonds, stating that a friend of his in New York had a "considerable amount" of the former and about $20,000 worth of the latter (Tr. 387-388, 396, 398-400, 403-405; R. 36-37, 44-45, 46-48, 49-52). Nesbitt told him that he would check their market status and advise him thereon (Tr. 387; R. 36-37). Subsequently, Nesbitt, whom petitioner had telephoned several times concerning the bonds, informed him that the HOLC bonds had been "called," but that if petitioner would furnish him with the serial numbers of the bonds he would attempt to negotiate them for him (Tr. 388-389; R. 37-38). Thereafter, petitioner failed to communicate with Nesbitt (Tr. 389; R. 38).

On September 10, 1948, petitioner sold, through one Parnell, an attorney and bank director in Indiana, Pennsylvania, all of the West Penn Power bonds, of $20,000 par value, which a few months before had disappeared from Blyth and Company in New York City (Tr. 341, 345-346, 353-355, 356-364, 369-370; R. 14, 18-19, 25-28, 28-31).

In requesting Parnell to make the sale for him, petitioner stated that the reason for doing so was that "he was not acquainted with banks in Indiana", although Indiana is but six miles from Homer City, where petitioner lived (Tr. 345, 352-353, 381; R. 18, 24-26). He also told Parnell that he won some bonds through gambling (Tr. 350; R. 22-23). Parnell had never before handled any security transactions for petitioner (Tr. 348, 351; R. 20-21, 23-24).

On September 28 and October 25, 1948, petitioner sold, through Parnell, another group of securities, of $57,600 par value, which were part of the HOLC bonds which had disappeared from the California bank in 1944 (Tr. 346-348, 350-352, 365-366, 368-371; R. 19-21, 22-25).[2]

On October 20, 1948, petitioner also had Parnell sell for him a group of securities of $20,000 par

[2] On May 1, 1944, the day preceding their disappearance, the HOLC bonds had been "called," and consequently since that day bore no interest on the investment which they represented (Tr. 26-27, 31). At the time of their sale petitioner told Parnell that he wished to negotiate them because "he had some business ventures" (Tr. 346; R. 19); and that he had won them and the Treasury bonds which he sold on October 20, 1948, by gambling (Tr. 350-351; R. 22-24).

value (Tr. 347). They were the Treasury bonds which had vanished, on September 13, 1948, from the Modern Industrial Bank in New York (Tr. 367-368, 378-379).

All the coupons which had become due since the disappearance of the bonds were still attached to the bonds at the time of their sale by petitioner (Tr. 265-267, 370-371).

Petitioner did not offer any evidence in his own behalf.

In submitting the case to the jury the judge charged that the jury must determine whether the bonds had been stolen; whether petitioner possessed the stolen bonds; whether he knew them to be stolen; whether he transported or caused them to be transported into Pennsylvania from another state, knowing them to have been stolen; and then whether he sold them knowing them to have been stolen in a state other than Pennsylvania (R. 66-67). He charged as to each transaction that there was no direct proof that defendant transported or caused the transportation of the bonds (R. 62, 63, 65, 66).

As to the U. S. Treasury bonds stolen in 1948, a month before their sale the judge charged (R. 67):

> * * * If you find that these bonds were stolen or converted, you might infer from the defendant's possession of these bonds, stolen a little over a month before, that he

> transported them or sold or disposed of them, knowing them to have been stolen, unless the defense has satisfactorily explained to you his possession of these bonds.

He stated that the inference might also arise with respect to the West Penn bonds stolen in July, 1948, to which petitioner referred on August 3, 1948, and which he sold in September, 1948, but stated that the inference was, in his opinion, a "weak" one (R. 68). He charged that "no inference" would arise from petitioner's possession of the bonds stolen in 1944 and 1945 (*ibid.*).

The judge further charged (R. 69):

> Consider all the evidence and the circumstances concerning his possession of these bonds. The fact that the defendant had possession of all of the bonds, if stolen, in my opinion is a circumstance from which you might find guilty knowledge on the part of the defendant. However, you are not bound by my opinion. It is your duty to find the facts.

ARGUMENT

1. Petitioner does not deny that he possessed and sold the stolen bonds. He argues, however, that proof of such facts is insufficient to prove (1) that he caused the transportation of the bonds knowing them to be stolen or (2) that the bonds which he sold were in interstate commerce at the time of sale. There is no merit in this contention.

a. As to the group of offenses charging trans-

portation of the stolen bonds, the Government had to prove (1) that the bonds had been stolen or converted, (2) that petitioner knew that fact, and (3) that petitioner caused the transportation. We submit that all such facts were proved.

Clearly the jury was entitled to believe that the bonds had been stolen. As the trial court pointed out, "The jury would have been naive indeed if it had found from the evidence that all four of these disappearances * * * were due to fortuitous circumstances instead of from theft, conversion, or fraud as charged. This is especially true when, without explanation, over $180,000.00 of the bonds eventually gravitated from four widely separated institutions into the possession of this defendant at his home in Homer City, Pennsylvania" (R. 79).

The jury also had before it ample evidence to justify the finding that defendant knew that the bonds had been stolen. The fact that four different sets of stolen bonds gravitated to petitioner in itself gives rise to such an inference. His furtiveness in going to Parnell in another town in order to negotiate most of the bonds, after he had disposed of one group in his home town, is another indication of guilty knowledge. The HOLC bonds, stolen in California, bore no interest because they had been called before the theft. The fact that four years later petitioner was negotiating them is another

circumstance tending to show his knowledge of their unlawful status.

Likewise the jury was justified in finding that defendant caused the transportation. The bonds had all been stolen outside the state of Pennsylvania. They all appeared in defendant's hands in the state of Pennsylvania. Obviously they had been transported in interstate commerce. Again, the jury was justified in finding, from the circumstance that all four groups of stolen bonds had gravitated to petitioner, that he was instrumental in bringing about that result, and that the bonds were transported to Pennsylvania because petitioner was in Pennsylvania and arranged to have them brought to him. This view is supported (but not, as petitioner claims, established) by the fact that, as to certain of the bonds, petitioner told Nesbitt that a friend in New York had them.

Thus the Government did not rely to any great extent on the presumption from recent possession to show guilty knowledge. In fact, the judge charged that no inference could be drawn from possession of the bonds taken in 1944 and 1945 and that the presumption arising from possession more than a month after the taking in 1948 was weak (R. 68). It is not the presumption, but, as the trial judge charged, the conglomeration of the proven facts that establishes petitioner's guilt.

The basic assumption of the petition for certiorari that the case rests on the presumption from

recent possession is thus unfounded. The trial judge's charge limited the effect of the presumption to the bonds stolen about a month before the sale and stated that the inference to be drawn therefrom was weak. His charge in this respect was clearly correct. See *Wilson* v. *United States,* 162 U.S. 613, 619-620; *Grover* v. *United States,* 183 F. 2d 650 (C.A. 9); *Petrilli* v. *United States,* 129 F. 2d 101 (C.A. 8), certiorari denied, 317 U.S. 657; *Husten* v. *United States,* 95 F. 2d 168 (C.A. 8); *Rosen* v. *United States,* 271 Fed. 651, 655 (C.A. 2).[3] The fact that the bonds were negotiable instruments does not detract from the weight of the fact that identified stolen bonds appeared in petitioner's possession in another state a short time after the theft.

b. As to the counts charging sale, the Government had to prove (1) that the bonds were stolen,

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[3] The case of *Bollenbach* v. *United States,* 326 U.S. 607, upon which petitioner relies, does not preclude the drawing of inferences, from the unexplained possession in one state of negotiable instruments stolen in another state, that the possessor had knowledge of the theft and participated in the interstate transportation of such instruments. It merely held that it was improper to infer the fact of a defendant's participation in the interstate transportation of stolen securities, in order to convict him of a "conspiracy" to do so, where the evidence, without more, showed that his possession of such securities was acquired by him following the termination of the transportation, solely for the purpose of disposing of them as a "fence." The holding in that case is limited to the peculiar facts surrounding the supplemental instructions, to a "hopelessly deadlocked" jury, to the effect that they could find an accused "guilty of a conspiracy to transport stolen notes if he joined in their disposal after the transportation had ended" (326 U.S. at 613, 614).

(2) that at the time he sold them petitioner knew them to be stolen and (3) that at such time they were in interstate commerce.

As we have shown, the first two elements were abundantly proved. The interstate character of the bonds at the time of sale is the only issue as to these counts.

We think there can be no question as to the interstate character of bonds stolen in New York and New Jersey about a month before their sale. Manifestly the jury was justified in inferring that the ultimate purpose of the theft was sale and that the bonds had not come to rest until they were sold in another state. See *Parsons* v. *United States,* 188 F. 2d 878 (C.A. 5); *McNally* v. *Hill,* 69 F. 2d 38 (C.A. 3).

There is more question as to the interstate character of bonds stolen three or four years before the sale. As to HOLC bonds stolen in California, however, there is proof that before the sale in Pennsylvania, petitioner told Nesbitt that a friend in New York had those bonds to sell. The jury thus had before it evidence to show that such bonds were still in interstate commerce at the time petitioner sold them. If the evidence is sufficient to sustain the conviction on any one count, the general sentence imposed on petitioner would remain undisturbed, since it was imposed on the whole indictment and does not exceed the maximum that could have been given under any one count. *Abrams* v. *United*

States, 250 U.S. 616, 619; *Powers* v. *United States,* 223 U.S. 303, 312; *Claassen* v. *United States,* 142 U.S. 140, 146.

2. Petitioner's contention that his statement to Nesbitt that a friend in New York had HOLC and West Penn bonds to sell is an uncorroborated admission used to establish the corpus delicti (Pet. 28-31) is refuted by the facts discussed in point one. The stolen character of the bonds, the fact that they had been transported from the place of theft to Pennsylvania, and petitioner's knowledge of their stolen character were all established by independent evidence.

The only element of any offense which Nesbitt's testimony can be said to establish is that the HOLC bonds stolen in California in 1944 were still in interstate commerce at the time they were sold by petitioner in September and October 1948. The statement to Nesbitt was made in August prior to the sale. The rule requiring corroboration does not apply to admissions prior to the crime. *Warszower* v. *United States,* 312 U.S. 342, 347.

CONCLUSION

The judgment below is correct. The petition for certiorari presents no questions warranting review by this Court and should be denied.

Respectfully submitted,

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